



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

Application of Harry K. Carr, Jr., et al., for a  
Permit to Remove Materials from the Bed of Lake  
Noquebay, Town of Middle Inlet, Marinette  
County, Wisconsin

Case No. 3-NE-97-0517UG

**FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER**

Pursuant to due notice hearing was held on August 4, 1998, at Marinette, Wisconsin, Jeffrey D. Boldt, administrative law judge (ALJ) presiding. Pursuant to the agreement of the parties, the record was held open to allow for the submission of aerial photos. Said photos, presented at the hearing as slides, were received on August 14, 1998.

Further, correspondence was received ex parte on August 11, 1998, and the parties were given until September 4, 1998 to comment. The last submittal was received on September 4, 1998.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Harry K. Carr, Jr.  
Robert and Eileen Conant  
Robert K. Gollman  
Karen E. Brice, by

Harry K. Carr  
3487 Bay Highlands Drive  
Green Bay, WI 54311

Wisconsin Department of Natural Resources, by

Peter D. Flaherty, Attorney  
P. O. Box 7921  
Madison, WI 53707-7921

Bill Plucker  
N8554 Lake Road  
Wausauke, WI 54177

## FINDINGS OF FACT

1. Harry K. Carr, Jr. and others, 3487 Bay Highlands Drive, Green Bay, Wisconsin, 54311, completed filing an application with the Department of Natural Resources (the Department) for a permit under sec. 30.20, Stats., to remove materials from the bed of Lake Noquebay, Town of Crivitz, Marinette County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.20 and 30.02, Stats.

2. The co-applicants each own real property located in Section 4, Township 32 North, Range 21 East, Marinette County. Each co-applicant owns one or more separate lots at the above described location. The five separate lots are adjacent to each other and consist of between 100 and 130 feet of riparian frontage. The above-described property abuts Lake Noquebay which is navigable in fact at the project site.

3. The applicants propose to remove weeds and sediment from the bed of Lake Noquebay below the ordinary highwater mark (OHWM) adjacent to their riparian property.

4. The purpose is to clear vegetation, living and dead, and muck sediments to allow access by boat to Lake Noquebay.

5. DNR Area Water Management Specialist Robert Rosenberger testified that the area to be dredged is well below the OHWM, and thus "lakebed" subject to the public trust doctrine. Further, there is no question that it would not be possible to clear the area of sediment and vegetation without disturbing the existing vegetation and "removing materials from the bed" of Lake Noquebay within the meaning of sec. 30.20, Stats (Rosenberger)

6. The area of the proposed dredging is a shallow, open water marsh. This community of marsh plants is relatively rare on Lake Noquebay. DNR Senior Water Quality Specialist Tim Rasman identified over 20 species of aquatic plants in area below the ordinary high water mark to the open waters of the lake. These include wild rice, cattails, bulrush, carex and tag alder. (Ex. 20) While there are other such areas on the lake, loss of this dense and complex wetland plant community would damage the public interest in maintaining plant and wildlife diversity.

7. Removal of wetland vegetation and organic soils will have a detrimental impact upon the public interest in water quality in and around the project site. Further, increased boat traffic would detrimentally impact water quality by resuspending bottom material and increasing turbidity. Rasman provided undisputed expert testimony that the existing near-shore plant community provides a critical function in absorbing non-point run-off into Lake Noquebay. Rasman described extensive efforts made by state and local officials to maintain natural near-shore vegetation as a natural and stable buffer against detrimental impacts to water-quality caused by run-off into Lake Noquebay. Marinette County Water Resources Specialist Charles Druckery confirmed the importance of the transitional open water marsh to overall efforts to maintain and improve water quality on the lake. Issuance of the instant permit would not be consistent with those efforts. Further, Rasman opined that the proposed dredging would likely expose the project area to invasion by exotic nuisance plant species, including purple loosestrife.

8. The proposed project would have a detrimental impact upon the public interest in maintaining fishery values on Lake Noquebay. Department Senior Fishery Biologist Russell Heizer provided undisputed expert testimony that removal of the near shore vegetation would expose fish spawning areas lakeward of the dredging footprint to wind and wave action. This would harm vegetation used by fish for nursery and cover. Mr. Plucker put it well when he said some lake users want what amounts to "... a swimming pool with fish in it." Near shore vegetation is necessary to provide and maintain a fishery. The wetland vegetation in and around the site of the proposed dredging provides habitat for bluegill, yellow perch, largemouth bass and northern pike. The area is currently suitable as a spawning area for northern pike and largemouth bass. The dredging would directly remove vegetation necessary to maintain the fishery, and will also have a detrimental impact on aquatic insects and minnows necessary to support the fishery. (Heizer)

9. The proposed project would have a detrimental impact upon maintaining wildlife diversity. The area provides habitat for numerous small furbearers, reptiles and amphibians, and a wide variety of birds and waterfowl. The area is suitable habitat for the state-endangered Forster's tern, which has been observed on Lake Noquebay, and also for black tern, which are known to nest on Lake Noquebay. The proposed dredging would likely destroy a rare patch of suitable nesting habitat for both species. (Huff) Further, both tern species and other wildlife make use of fish forage species such as those described above. The destruction of this near shore wildlife habitat would not be consistent with the public interest.

10. The project, if approved, would likely contribute to detrimental cumulative impacts to Lake Noquebay. The applicants repeatedly referenced another dredged area, as somehow justifying destruction of this pristine area. If this project were approved, it is likely that others would rely on this permit to seek further dredging in wetland areas on the lake.

11. The proposed project would not be consistent with the public interest in natural scenic beauty. The existing project site is an attractive and largely undeveloped open water marsh, supporting mostly emergent and floating leaf vegetation. (Ex. 29) Destruction of the natural and diverse marsh plant community and replacement by a more sterile sand bottom area would not be consistent with the public interest in preserving and protecting the natural beauty of Lake Noquebay. (Rosenberger)

12. The proposed project is "water dependent" and/or "wetland dependent" within the meaning of sec. NR 103.07(3), Wis. Admin. Code, because dredging a navigational boating channel is an "activity that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose." A practical alternative exists to dredging the wetland areas, as access to the open water of the lake could be obtained by constructing a small pier on pilings.

13. The proposed dredging project would result in detrimental impacts to the functional values of the affected wetlands. These impacts consist of the detrimental impacts to fish and wildlife habitat, water quality and natural scenic beauty described above. Further, the proposed dredging would have a detrimental impact on the wild rice bed, which has been designated a "special natural resource interest" within the meaning of sec. NR 103.04(11), Wis. Admin. Code.

## DISCUSSION

The Department of Natural Resources presented an overwhelming amount of undisputed expert testimony that the proposed dredging would not be "consistent with the public interest" in Lake Noquebay. Mr. Gollman offered an articulate and heartfelt plea that some alternative means, such as small shared piers placed upon pilings above emergent vegetation, be considered to allow these riparians access to Lake Noquebay that does not conflict so fundamentally with the public interest. That issue is not before the ALJ and the existing dredging proposed must be denied.

## CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.20 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the removal of materials from the bed of Lake Noquebay.
2. The project is a type IV action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type IV actions do not require the preparation of a formal environmental impact assessment.
3. The proposed project would not be "consistent with the public interest" in Lake Noquebay within the meaning of sec. 30.20(2)(c), Stats.
4. The proposed project does not meet water quality standards for wetlands as set forth in sec. NR 103, Wis. Admin. Code. Specifically, there are practical alternatives to the proposed dredging to accomplish the basic project purpose of obtaining access to Lake Noquebay. Further, the proposed dredging would have a detrimental impact on wetland functional values.
5. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. Muench v. PSC, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only promote navigation but also to protect and preserve its waters for fishing, hunting, recreation and scenic beauty. WED, Inc. v. DNR, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978). The proposed project would be detrimental to the public interest in maintaining fish spawning habitat and aquatic plants.
6. A project may be determined to be "detrimental to the public interest" within the meaning of Chapter 30, Stats., on the ground that it impairs natural beauty. This is a proper basis for denial of a permit. Clafflin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would not be consistent with the public interest in natural scenic beauty.
7. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried its burden of showing that the proposed project would be consistent with the public interest in navigable waters.

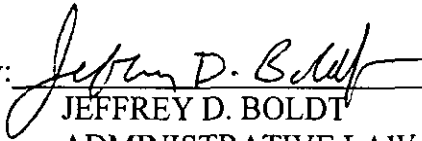
8. The DNR must consider the "cumulative impact" of many small projects on a lake as a whole in carrying out its legislatively assigned duty in protecting the navigable waters of the state. Sterlingworth Condominium Assoc. v. DNR, 205 Wis. 2d 710, 721-722, 556 N.W.2d 791 (Wis. Ct. App. 1996). Accord: Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966).

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the permit application shall be DENIED.

Dated at Madison, Wisconsin on October 16, 1998.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
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By:   
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.